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DISTRICT 8

Arizona House of Representatives
Phoenix, Arizona 85007

COMMITTEES:
RULES,
Vice-Chairman
EDUCATION
NATURAL RESOURCES
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LEGISLATIVE COUNCIL

April 15, 2019

Representative John Allen
Representative Kirsten Engel
Representative Gail Griffin
Representative Diego Rodriguez
Members of the Ethics Committee
Arizona House of Representatives
1700 W. Washington Street
Phoenix, AZ 85007

Re: Ethics Complaint; Representative Anthony Kern; R. McHood 4-10-2019

Dear Members of the Committee:

Pursuant to Rule 14, with this letter I am distributing a copy of an ethics complaint received regarding Representative Anthony Kern filed by Rebecca McHood. While the matter is under consideration, to avoid the possibility of ex parte communications, I respectfully remind members to refrain from discussing the complaint outside of the Ethics Committee.

I am providing a copy of this correspondence together with a copy of the complaint to Representative Kern. Rule 14 further provides "[t]he member who is the subject of the complaint shall have the opportunity to respond to the complaint in writing." Matters of any scheduling, including the scheduling of a time frame for Representative Kern's response, will be addressed in the future as appropriate.

Sincerely,

A handwritten signature in black ink, appearing to read "T.R. Shope, Jr.", written in a cursive style.

Thomas R. Shope, Jr.
Chairman
House Ethics Committee

Enclosure:

cc:

Speaker Russell W. "Rusty" Bowers
Representative Anthony Kern
Jim Drake, Chief Clerk

The Honorable Thomas "T.J." Shope
Chairman, House Ethics Committee

Dear Chairman Shope,

I am writing to submit a formal ethics complaint against Representative Anthony Kern for violating the Arizona constitutional provisions that prohibit a member of the legislature from holding position with a municipality. *See* Ariz. const. art. 4, pt. 2, §§ 4 & 5.

Statement of Facts

Based on my personal knowledge from media reports and photographs posted on social media, it appears that Representative Kern is a marshal with the City of Tombstone. The *Phoenix New Times* reported on March 5, 2019 (article attached) that Representative Kern obtained his peace officer certification by waiver in January 2017 from the Tombstone Marshal's Department. In the article, Representative Kern did not dispute that he is a certified peace officer with the City of Tombstone.

Indeed, the Tombstone Marshal's Department has prominently featured Representative Kern as a member of that department in its social media posts on Facebook. The enclosed photographs were posted on the official Facebook page of the Tombstone Marshal's Office and are dated October 27, 2018. In the images, you can clearly see that Representative Kern is wearing a marshal uniform with a badge and firearm, standing beside fellow marshals at what appears to be a county fair. Governor Doug Ducey is even included in some of the photographs.

Representative Kern's brazen flaunting of his employment with the City of Tombstone's marshal's department is dishonorable and unbecoming of a member of the Arizona House of Representatives. His conduct clearly violates the Arizona Constitution as well as undermines the public's confidence in this institution and violates the order and decorum necessary to complete the people's work in this state.

Violations of Laws

The Ethics Committee is empowered to investigate complaints and charges against members, A.R.S. § 38-519, as well as claims of disorderly conduct, Ariz. Const. art. 4, pt. 1, § 11, violations of state or federal laws, conduct violating the public trust or adversely reflecting upon the House, and unethical or unprofessional conduct, such as defined in A.R.S. § 32-1901.01.

Article 4, part 2, section 4 of the Arizona Constitution prohibits a "person holding any public office of profit or trust under the authority . . . of this state" from serving in the state legislature. Additionally, section 5 of that same article provides that "[n]o member of the legislature, during the term for which he shall have been elected or appointed shall be eligible to hold any other office or be otherwise employed by the state of Arizona or, any county or incorporated city or town thereof. This prohibition shall not extend to the office of school trustee, nor to employment

as a teacher or instructor in the public school system." Simply put, a legislator cannot be employed by any incorporated city or town. *See* Ariz. Atty. Gen. Op. 56-85 (attached) (concluding that a legislator could not hold an office or be employed by a municipality when the office is served without pay).

The Arizona Supreme Court explained the purpose of these constitutional provisions: "The evil sought to be avoided is the participation by a legislator in the deliberations and enactments pertaining to a public office which might subsequently be held by him during his term as a legislator." *State ex rel. Pickrell v. Myers*, 89 Ariz. 167, 169 (Ariz. 1961). This is precisely the situation in which Representative Kern finds himself. While serving as a member of the legislature, he is currently voting on measures that directly impact law enforcement officers in this state. See, for example, the attached *Phoenix New Times* article which outlines Representative Kern's former position with the El Mirage Police Department and his current support for HB2671.

Because Representative Kern is prohibited from holding any office of profit or trust, by accepting the position of marshal with the City of Tombstone, Representative Kern must be deemed to have vacated the office of state representative. *See McClusky v. Hunter*, 33 Ariz. 513, 532 (1928) (concluding that "the occupant of an office who accepts a second office when prohibited by law from doing so ipso facto vacates the first one, the effect being the same as the acceptance of a second incompatible office at common law") (citing *Campbell v. Hunt*, 18 Ariz. 442 (1917); *see also* Ariz. Atty. Gen. Op. 56-85 (noting that *McCluskey* court "held that the acceptance of the later officer, even though without remuneration, operated as a vacation of the former office").

Supporting Documents

Attached to this Complaint are a copy of the article from the *Phoenix New Times* as well as photographs from the Tombstone Marshal's Office official Facebook page, which are dated October 27, 2018.

Based on the foregoing, I request that the Ethics Committee immediately convene and investigate the alleged constitutional violation of Representative Kern. I further request that, if the Ethics Committee investigation determines that the allegations against Representative Kern regarding his disqualification from office are true, the committee recommend Representative Kern's expulsion as provided in the Arizona Constitution, article 4, part 2, section 11.

Submitted by,



State of Arizona)
) ss.
County of Maricopa)

Sworn to and subscribed before me on 10 day of ^{April}~~March~~ 2019, by


Notary Public Signature

